Supreme Court, U. S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1217

LAWRENCE A. UZZELL, et al.,
Petitioners,

v.

WILLIAM C. FRIDAY, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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DI CESARE - Printing — 331-8101 — Washington, D.C. 20006

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IN THE

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents respectfully pray that a Writ of Certiorari to review the order of the United States Court of Appeals for the Fourth Circuit entered in this case on November 9, 1979 be denied.

OPINIONS BELOW

The order of the Court of Appeals for the Fourth Circuit from which the Petition arises was entered on November 9, 1979 and to Respondents' knowledge has not been reported. Prior to that order, the Court of Appeals upon remand entered an opinion on February 2, 1979. This opinion is reported at 591 F. 2d 997 (1979). The order of the United States Supreme Court directing remand is reported at 438 U.S. 912, 57 L. Ed. 2d 1158, 98 S. Ct. 3139 (1978). The remand was ordered after respondents petitioned this Court for Certiorari and the basis of the remand was reconsideration in light of the decision in BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). The original decision of the Court of Appeals is reported at 547 F. 2d 801 (1977); following a petition for rehearing *en banc* that Court issued an *en banc* decision on July 28, 1977. This latter decision is reported at 558 F. 2d 727 (1977). The opinion of the District Court for the Middle District of North Carolina is reported at 401 F. Supp. 775 (1975).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. 1254(1). For reasons which appear

below, respondents contest this invocation. We believe this case is not in an appropriate posture for the exercise of this Court's jurisdiction.

QUESTIONS PRESENTED

1. WHETHER CONGRESS HAS DEPRIVED A SENIOR JUDGE OF THE COURT OF APPEALS OF POWER RETAINED BY HIM UPON HIS RETIREMENT TO SIT *EN BANC* UPON CASES THERETOFORE HEARD ON A PANEL.

2. WHETHER THE RECALL OF MANDATE AFTER NINE MONTHS AND AFTER THE APPOINTMENT OF TWO NEW JUDGES DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1 of the Constitution of the United States provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

Section 5 of Public Law 95-486, 95th Congress, October 20, 1978, 92 Stat. 1629, provides:

"Section 5. (a) Section 46(c) of Title 28 of the United States Code is amended—(1) in the first sentence, by striking out 'division' and inserting 'panel' in lieu thereof; and
(2) by striking out the third sentence."

28 U.S.C. §46(c), prior to October 20, 1978, provided:

"(c) Cases and controversies shall be heard and determined by a Court or division of not more than three judges, unless a hearing or rehearing before the court *en banc* is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court *en banc* shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court *en banc* in the rehearing of a case or controversy if he sat in the court of division at the original hearing thereof."

STATEMENT OF THE CASE

This case presents a rather unusual procedural pattern. It began when petitioners filed a complaint in the United States District Court for the Middle District of North Carolina on June 15, 1974. The attack was based on rules and regulations adopted by the student government at the University of North Carolina at Chapel Hill and the alleged violations involved the Fourteenth Amendment and various provisions of the

Civil Rights Acts. Shortly thereafter respondents moved for summary judgment; on September 17, 1975, their motion was granted. (See Supplemental Appendix, pg. 1-A.)

The petitioners appealed and on January 5, 1977, the Court of Appeals for the Fourth Circuit affirmed the decision of the trial court in part, but reversed the summary judgment on two issues and ordered that summary judgment be entered for petitioners on these claims. (See Supplemental Appendix, pg. 15-A) Respondents moved for a rehearing, but this was denied in an order filed on February 28, 1977. Although the mandate was issued, the Court recalled its decision *sua sponte* on March 21, 1977.

Thereafter, hearing before the Court of Appeals *en banc* was scheduled. On this occasion Judges Haynsworth, Winter, Butzner, Russell, Widener, Hall and Senior Judge Bryan comprised the *en banc* court. On July 28, 1977, in a 4 to 3 decision, the Court of Appeals affirmed the decision of the original panel, subject to certain additions. Judges Winter, Haynsworth and Butzner dissented. (See Supplement Appendix, pg. 24-A.)

Respondents then filed a petition for a Writ of Certiorari to this Court, challenging both procedural and substantive issues inherent in the Fourth Circuit decision. In an Order filed on July 3, 1978, this Court granted the Writ, vacated the *en banc* decision and remanded the action to the Court of Appeals. 438 U.S. 912. Reconsideration in light of BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE, 438 U.S. 265 (1978) was requested.

While this case was on remand to the Fourth Circuit, Congress enacted Public Law 95-486 on October 20, 1978. This law amended 28 U.S.C. §46(c), the statute governing the assignment of judges for hearings before the Court of Appeals. The amendment in effect limited the composition of *en banc* hearings to those Circuit judges in regular active service. Permissive language allowing senior and retired judges to sit on these hearings was deleted.

Unaware of the passage of this amendment, the Fourth Circuit scheduled a rehearing after remand for November 16, 1978. The same judges who previously sat on the *en banc* hearing again convened to hear the case. This group included Judge Bryan, a Senior Circuit Judge. Following this rehearing, the Court again split 4 to 3 in reaffirming the *en banc* decision previously entered. (See Supplemental Appendix, pg. 29-A.)

On May 31, 1979, the Court of Appeals through the office of its clerk, informed counsel for all parties that Public Law 95-486 had been effective on the date of the rehearing *en banc* and thus that Judge Bryan's participation was not authorized. (See Appendix A to Petition.) The Court invited counsel to suggest resolutions to the problem and responses were received from counsel for all parties. On November 9, 1979, by Order of the Court, the mandate was recalled and the decision of the *en banc* Court was withdrawn. (See Appendix B to Petition.) The case was then set for rehearing in an expedited fashion and on January 7, 1980, the case was fully argued by all parties before a properly constituted *en banc* Court.

REASONS FOR DENYING THE WRIT

1. Because the rehearing by the Fourth Circuit, which is under attack here, has already been scheduled and held, the issues petitioners seek to raise are now moot. There is no live controversy for this Court to entertain and the petition should therefore be denied.

2. Petitioners seek to bring before the Court an interlocutory matter which is neither final nor otherwise appropriate for review. No decision has yet been rendered by the Fourth Circuit and no reasons have been tendered for avoiding an orderly appellate process. The well-established policy against piece-meal appeals and review of non-final orders calls for a rejection of the Petition for Writ of Certiorari here.

3. Congress clearly had the power to regulate the assignment of judges for the Courts of Appeals and the Fourth Circuit certainly was obligated to follow the Congressional mandate. In meeting its obligations, the Fourth Circuit had authority to reconstitute one of its own hearings, such that it would be properly authorized to hear the case before it. Even if this Court substantively reviews the Petition, the lack of merit therein calls for its denial.

ARGUMENT

I.

Petitioners attack the action of the Fourth Circuit Court of Appeals in recalling their mandate in this case and ordering a new *en banc* hearing. What petitioners

fail to mention is that this hearing not only has been called, it also has been held. On January 7, 1980, all parties in this case appeared before the Fourth Circuit *en banc* and presented their arguments in full. At no time between the notification that recall and reargument were being considered and the hearing itself did petitioners seek to stay that Court's action or petition either the Fourth Circuit or this Court to review the questions presented now.

Because the reconstitution of the Court of Appeals and the subsequent hearing have already been accomplished, respondents believe that no live controvesy is presented by the Petition. We, therefore, respectfully suggest that the issues raised there are moot and that this Court has no actual case before it for review.

Federal courts do not possess the power to decide questions that cannot affect the litigants in the case before them. See NORTH CAROLINA v. RICE, 404 U.S. 244, 246, 30 L. Ed. 2d 413, 92 S. Ct. 402 (1971). Article III of the United States Constitution limits the jurisdiction of these Courts to actual or live cases or controversies. See PREISER v. NEWKIRK, 422 U.S. 395, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975); DEFUNIS v. ODEGAARD, 416 U.S. 312, 40 L. Ed. 2d 164, 95 S. Ct. 1704 (1974). Unless a substantial controversy exists between parties having adverse and immediate legal interests, the Court has nothing but a hypothetical question before it. To answer such an inquiry would be tantamount to an advisory opinion, an extension of jurisdiction not permitted by Article III. See MARYLAND CASUALTY CO. v. PACIFIC CO., 312

U.S. 270, 85 L. Ed. 826, 61 S. Ct. 510 (1941); NORTH CAROLINA v. RICE, *supra*. Finally, the *possibility* that the issues raised may at some later point affect the litigants does not render the case justiciable. Unless and until a true dispute surfaces, no jurisdiction exists. See PREISER v. NEWKIRK, *supra*.

In the case at bar, the Fourth Circuit has already held the hearing which petitioners now seek to stop. Thus, the issues they raise cannot possibly affect the litigants now and no immediate and actual controversy is alive at this time. The possibility that the composition of the Fourth Circuit at this hearing may affect the parties in the future is speculative at best; it cannot be argued that any present dispute exists and mere possibilities and speculations do not confer Article III jurisdiction.

The fact that an actual case is not present here undermines the validity of petitioners' request for review. Because the issues raised appear to be moot, we respectfully request that the Petition be denied.

II.

There has to date been no final determination on the merits of this case. Nor are there issues presented here which parallel the grant or denial of injunctive relief which on occasion enjoy immediate appellate review. Instead, petitioners present a purely interlocutory matter which does not directly affect the rights of any party. To allow this Petition, then, would completely subvert the normal appellate process.

Federal appellate jurisdiction generally depends on the existence of a decision that concludes the litigation on the merits and leaves nothing for the court to do but execute the judgment. COOPERS & LYBRAND v. LIVESAY, 437 U.S. 463, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978); CATLIN v. UNITED STATES, 324 U.S. 229, 89 L. Ed. 911, 65 S. Ct. 63 (1945). Where an order of the court does not extend or deny final relief but simply moves the case towards trial or other disposition, it is interlocutory and not appealable. See SWITZERLAND CHEESE ASS'N v. HORNE'S MARKET, 385 U.S. 23, 17 L.Ed. 2d 23, 87 S. Ct. 193 (1966).

If these requirements of finality are not followed, orderly judicial procedures completely break down. The trial process is disrupted, the course of litigation is substantially delayed and unnecessary multiple appeals become the order of the day. See COOPERS & LYBRAND v. LIVESAY, *supra;* EISEN v. CARLISLE & JACQUELIN, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974). There are then important judicial interests militating strongly against piece-meal review.

There are, of course, limited exceptions to the finality requirement. Where injunctive relief is granted or denied, such orders may be appealable. 28 U.S.C. §1292(a) (1); see also LIBERTY MUTUAL INS. CO. v. WETZEL, 424 U.S. 737, 47 L. Ed. 2d 435, 96 S. Ct. 1202 (1976). And where a distinct part of a controversy is settled conclusively and could not be reviewed effectively on appeal from the final judgment, interlocutory review has been permitted. This exception, however, is only applicable in a "small class" of

decisions. See COOPERS & LYBRAND v. LIVESAY, *supra.* Thus, in the vast majority of cases, the finality requirement applies; review of procedural and interlocutory court rulings must await a decision of the entire case on the merits.

The Petition at bar is an excellent example of the piece-meal appeal eschewed by the finality rules. No decision on the merits has been reached and final relief has neither been granted nor denied. Injunctive orders are not at issue and all questions presented here will be appealable following a final judgment. Thus, the exceptions to the finality requirements are not applicable here. The effect of the Fourth Circuit's orders was simply to move the case *towards* final disposition, not to conclusively settle any party's claims. In this posture, we believe the Petition is nothing more than a request for piece-meal review, an invitation that this Court has consistently declined.

Finally, we should point out that even petitioners recognize that the review sought here is most unusual. On page 11 of their Petition, they candidly state that challenges to a court's composition are generally raised during the normal course of review. Petitioners should be held to their assertion.

Well settled principles of appellate procedure command that all questions involved in a case await final judgment before they may be presented for review. Those principles ring particularly true where, as here, an appeal would completely disrupt and delay the final disposition of this case. Because no reasons have been

cited which would support such an upheavel, we respectfully ask this Court to avoid this result; petitioners' invitation should be declined.

III.

Even if this Court disregards the two jurisdictional mandates discussed above, there is yet further reason for denying the Petition in this case. Our argument here is that petitioners have not raised questions which are either susbstantive or supported by legal principles or precedent. In short, both the amendment of the statute and the action of the Fourth Circuit Court of Appeals were valid and constitutional.

As noted above, petitioners initially challenge the authority of Congress to exclude Senior Circuit Judges from *en banc* courts, as it did in the amendment to 28 U.S.C. §46(c). In contrast, we are convinced that Congress had ample power to do exactly what it did.

Article III of the United States Constitution describes the judicial power of the Supreme Court, but specifically reserves the establishment of lower federal courts to Congress. That assembly was not constitutionally required to create inferior courts; nor was it required to invest them with all judicial powers. See PALMORE v. UNITED STATES, 411 U.S. 389, 36 L. Ed. 2d 342, 93 S. Ct. 1670 (1973). Jurisdiction of these courts depends entirely upon Congressional action; that body may grant limited, concurrent or exclusive jurisdiction or withold jurisdiction altogether. The degree and character of the jurisdiction is dependent upon what

Congress deems to be proper for the public good. See LOCKERTY v. PHILLIPS, 319 U.S. 182, 87 L. Ed. 1339, 63 S. Ct. 1019 (1943).

In exercising this power, Congress may also prescribe or regulate the modes of process and procedure. And this authority embraces the whole case and every transaction in it from commencement to termination, until the judgment is satisfied. See LIVINGSTON v. STORY, 34 U.S. 632, 9 L. Ed. 255, 9 Pet. 632 (1835); WAYMAN v. SOUTHARD, 23 U.S. 1, 6 L. Ed. 253, 10 Wheat. 1 (1825).

Also included within the Congressional discretion is the power to declare remedies and other relief in particular classes of cases and to designate specific courts for certain causes of action. See ALLEN v. STATE BOARD OF ELECTIONS, 393 U.S. 544, 22 L. Ed. 2d 1, 89 S. Ct. 819 (1969). Further, Article III's delegation to Congress extends to the withdrawal of jurisdiction and this revocation is proper even where cases are pending before the lower federal courts. See GLIDDEN CO. v. ZDANOK, 370 U.S. 530, 8 L. Ed. 2d 671, 82 S. Ct. 1459 (1962).

The GLIDDEN case is particularly instructive here for it too concerned the appointment and designation of federal judges. The challenge there was to an act of Congress giving the Supreme Court authority to assign Courts of Claims judges to sit on Circuit Court panels. This Court held without reservation that Congress indeed had the power to provide for the designation and assignment of judges and that this power was encompassed in Article III.

Turning back to the amendment in question here, we believe it certain that Congress had the power to designate the configuration of *en banc* Circuit Courts. This action was nothing more than a regulation of the procedures to be followed in the appellate court. This proscription is well within the Article III grant to Congress. See WAYMAN v. SOUTHARD, *supra.* Certainly, if Congress can grant or deny jurisdiction entirely it can regulate the size or composition of a particular class of courts. See PALMORE v. UNITED STATE, *supra.*[1]

More precisely on point, GLIDDEN v. ZDANOK, *supra,* bestows validity on the amendment to 28 U.S.C. §46(c). Congress has discretionary authority to designate and assign judges to particular courts and this was all the amendment in question here purported to do. Petitioners attack on the statutory amendment must be initially and completely rejected. The provision for the composition of *en banc* courts is both valid and constitutional.

Turning to petitioners other attack, that the Fourth Circuit had no authority to withdraw mandate and order a new hearing, this challenge too suffers from a lack of merit. If Congress has ordered a certain composition of *en banc* courts, the Fourth Circuit was

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[1]Petitioners' argument that the tenure and compensation provisions of Article III in some way preclude the amendment to 28 U.S.C. 46(c) enjoys no support. These provisions protect the judiciary from arbitrary removal or financial attack. See ATKINS v. UNITED STATES, 556 F. 2d 1028 (Ct. Claims 1977). They do not confer jurisdiction on any particular category of judges.

obligated to follow that proscription. Since that Court did nothing other than what it was ordered to do, a short answer to petitioners' attack is that no invalid or unauthorized action occurred. Without such a showing, the Petition may be dismissed on its face.

The Fourth Circuit action, however, is supported by independent grounds as well. The appellate courts have inherent powers to effectuate procedures ensuring that a court's jurisdiction is correctly exercised. See TEXACO, INC. v. CHANDLER, 354 F. 2d 655 (10th Cir. 1965). Moreover, because the actions here of recall and rehearing are similar to the issuance of perogative writs, the All Writs Act, 28 U.S.C. §1651(a), gave the Fourth Circuit the authority to proceed as it did.

The All Writs Act provides that federal courts may issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a). It is a legislative source of procedural instruments to be used as aids in the performance of judicial duties necessary to achieve the ends of justice. See UNITED STATES v. NEW YORK TELEPHONE CO., 434 U.S. 159, 54 L. Ed. 2d 376, 98 S. Ct. 364 (1977). The act itself has been given a flexible interpretation in order that the Courts may issue such writs whenever necessary to prevent the frustration of a court order or the proper administration of justice. See for example, FEDERAL TRADE COMMISSION v. DEAN FOODS CO., 384 U.S. 597, 16 L. Ed. 2d 802, 86 S. Ct. 1738 (1966).

The power conferred by the Act extends to the protection of the appellate courts, preventing the diminution of their jurisdiction and even protecting potential appellate jurisdiction where an appeal is not then pending. See ROCHE v. EVAPORTED MILK ASS'N., 319 U.S. 21, 87 L. Ed. 1185, 63 S. Ct. 938 (1943). Where the issuance of a writ is contemplated, the following factors may be considered by the courts: whether the matter is in the public interest; whether the issuance would affect the policy against piece-meal appeals; and whether legislative authority has been disregarded. See UNITED STATES ALKALI EXPORT ASS'N. v. UNITED STATES, 325 U.S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120 (1945). The clearer the lack of jurisdiction, the more appropriate the issuance of the writ. See EX PARTE CHICAGO ROCK ISLAND v. PACIFIC RY. CO., 255 U.S. 273, 65 L. Ed. 631, 41 S. Ct. 288 (1921); MORROW v. DISTRICT OF COLUMBIA, 417 F. 2d 728 (D.C. Cir. 1969).

In the case at bar these principles carry substantial weight. The Circuit Court discovered that a hearing had been conducted before an unauthorized court, thus heavily undermining its jurisdiction. To rectify the invalidity, the Fourth Circuit simply formed a proper court and called for a new hearing. We believe the court had inherent power to act as it did in order to preserve the integrity of its decisions. Beyond that the All Writs Act provided a power of authority for nullifying the unauthorized proceeding. As an aid to its appellate jurisdiction, jurisdiction which is not contested, the Court certainly had authority to constitute a proper court having jurisdiction over the case. See UNITED STATES v. NEW YORK TELEPHONE Co., *supra.*

Moreover, because legislative authorizations of jurisdiction had been disregarded in the conduction of the former hearing, the necessary elements for issuance of a writ were clearly present. As this Court recognized in EX PARTE CHICAGO ROCK ISLAND v. PACIFIC RY. CO., *supra,* where jurisdiction is lacking, a writ is entirely appropriate. Because the first Fourth Circuit hearing was without jurisdictional foundation, the Court's action was entirely proper.

Should this Court review the Petition substantively, we believe the weakness in the arguments presented will become apparent. Congress clearly had power to call for a certain category of judges to comprise *en banc* courts. When the Fourth Circuit acted to prevent a violation of this statutory mandate, it also had authority for its actions. No unconstitutionality or other invalidity in these procedures has been established and this omission calls for denial of petitioners' request.

CONCLUSION

Important jurisdictional principles of mootness and finality are applicable and controlling in this case. Initially the Petition for Writ of Certiorari may be denied on these grounds. If the substance of the Petition is scrutinized, there are yet other reasons for declining petitioners' invitation. Neither error nor impropriety has been shown and this failure deprives the Petition of all validity. On any one or more of these grounds, respondents request that the writ be denied.

Respectfully submitted, this 24th day of April, 1980.

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT were served upon:

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This the 24th day of April, 1980.

Elizabeth C. Bunting
Assistant Attorney General